

## END NOTES for Reply to National association of Broadcasters

<sup>1</sup> Section 29 of the Radio Act of 1927 provided that: “Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. *No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.*” 44 Stat. 1172-1173 (emphasis added). Likewise, today’s criminal indecency statute makes it a federal offense to utter “any obscene, indecent, or profane language by means of radio communication.” 18 USC §1464.

<sup>2</sup> *Pacifica*, 438 U.S. at 748-49.

<sup>3</sup> *Fox TV Stations, Inc., v. FCC*, 613 F.3d 317, 326 (2d Cir. 2010) (“*Second Circuit Fox II*”), *vacated and remanded on other grounds*, *FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307 (2012) (“*Supreme Court Fox II*”); *see also id.* at 326-27; *Fox TV Stations, Inc. v. FCC*, 489 F.3d 444, 465 (2d Cir. 2007) (“*Second Circuit Fox I*”), *reversed and remanded on other grounds*, *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502 (2009) (“*Supreme Court Fox I*”) (dicta) (“[W]e would be remiss not to observe that it is increasingly difficult to describe [one] broadcast media as [...] pervasive and [...] accessible to children.”).

<sup>4</sup> *Id.*

<sup>5</sup> *Pacifica*, 438 U.S. at 750.

<sup>6</sup> *See, e.g.*, Press Release, comScore, *comScore Releases April 2013 U.S. Online Video Rankings* (May 22, 2013), available at <http://finance.yahoo.com/news/comscore-releases-april-2013-u-182200937.html> (181.9 million Americans watched 38.8 billion online content videos in April); Darrell Etherington, *Mobile Video Views Up 300% In 2012, With Tablets Driving The Charge With A 360% Increase*, TECHCRUNCH (APR. 9, 2013), available at <http://techcrunch.com/2013/04/09/mobile-video-views-up-300-in-2012-with-tablets-driving-the-charge-with-a-360-increase/>; Marcelo Ballve, *Why People Watch Video On Their Smartphones*, BUSINESS INSIDER (Apr. 4, 2012, 4:37 PM), <http://www.businessinsider.com/why-people-watch-video-on-smartphones-2013-4#ixzz2UuOMj71M> (41 million people in the U.S. watch video on their phones).

<sup>7</sup> *See* National Telecommunications and Information Administration, *Household Broadband Adoption Climbs to 72.4 Percent* (Jun. 6, 2013), <http://www.ntia.doc.gov/blog/2013/household-broadband-adoption-climbs-724-percent>.

<sup>8</sup> Arbitron Inc. and Edison Research, *The Infinite Dial 2013: Navigating Digital Platforms*, at 9 (2013), available at [http://www.edisonresearch.com/wpcontent/uploads/2013/04/-Edison\\_-\\_Research\\_Arbitron\\_Infinite\\_Dial\\_2013.pdf](http://www.edisonresearch.com/wpcontent/uploads/2013/04/-Edison_-_Research_Arbitron_Infinite_Dial_2013.pdf).

<sup>9</sup> *See* JWire, *Insights: JiWire Mobile Audience Insights Report Q1 2013* at 14, <http://www.jiwire.com/insights> (last visited Jun. 18, 2013).

<sup>10</sup> *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, 27 FCC Rcd 3700, 3934-35 ¶ 377 (2013).

<sup>11</sup> *See* McDonald’s, *Free Wi-Fi at McDonald’s*, [http://www.mcdonalds.com/us/en/services/free\\_wifi.html](http://www.mcdonalds.com/us/en/services/free_wifi.html) (visited Jun. 17, 2013).

<sup>12</sup> *See* Starbucks, *Free Wi-Fi*, <http://www.starbucks.com/coffeehouse/wireless-internet> (visited Jun. 18, 2013).

<sup>13</sup> See Susan Stellan, *Craving Wi-Fi, Preferably Free and Really Fast*, NEW YORK TIMES, May 1, 2013 at F5.

<sup>14</sup> See, e.g, Lauren Hepler, *Santa Clara Launches Free Citywide WiFi Network*, SILICON VALLEY BUSINESS JOURNAL (Mar. 27, 2013), <http://www.bizjournals.com/sanjose/news/2013/03/26/santa-clara-launches-free-citywide.html>; Angela Medina, *The City of San Jose Unveils Fastest Public Wi-Fi Service in North America*, SPARTAN DAILY (Mar. 16, 2013), available at <http://spartandaily.com/100570/the-city-of-san-jose-unveils-fastest-public-wi-fi-service-in-north-america>; Albany FreeNet, <http://web.albanyfreenet.net/site/> (visited Jun. 18, 2013); WiFi Miami Beach <http://web.miamibeachfl.gov/wifi/> (visited Jun. 18, 2013); Ponca City, Oklahoma WiFi, <http://www.poncacityok.gov/index.aspx?NID=417> (visited Jun. 18, 2013).

<sup>15</sup> See *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, 27 FCC Rcd 3700, 3808 ¶ 157 (2013), citing Philip Goldstein, *Localytics: Only 6% of iPad Data Sessions are on Cellular Networks*, FIERCEWIRELESS, Mar. 23, 2012, <http://www.fiercewireless.com/story/localytics-only-6-ipad-data-sessions-are-cellular-networks/2012-03-23> (visited Oct. 16, 2012).

<sup>16</sup> *Id.* at 3846 ¶ 227.

<sup>17</sup> Victoria J. Rideout et al., Kaiser Family Foundation, *Generation M2: Media in the Lives of 8- to 18- Year-Olds*, at 22 (Jan. 2010), available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8010.pdf>.

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<sup>19</sup> See James Poniewozik, *The Children Are the Future (of Online Streaming Video)*, TIME (June 5, 2013), <http://entertainment.time.com/2013/06/05/the-children-are-the-future-of-online-streaming-video/> (Amazon announced a plan to begin offering children's programming following an agreement reached with Viacom); Roger Yu, *Amazon Snares 'SpongeBob' and 'Dora The Explorer'*, USA TODAY (June 4, 2013, 5:30 PM), <http://www.usatoday.com/story/money/2013/06/04/viacom-amazon-deal/2388415/> (Amazon's Vice President of Digital Video and Music noted, "[k]ids shows are one of the most-watched TV genres on Prime Instant Video."); George Szalai, *Analyst: Netflix's Popularity Driven by Kids TV Content*, THE HOLLYWOOD REPORTER (July 2, 2012, 7:41 AM), <http://bit.ly/11t9i50> (according to one analyst, Netflix has become "highly dependent upon kids TV," noting that "the moms we talked to originally subscribed to Netflix for themselves, but have recognized the dwindling supply of content for adults and are now using the service primarily for their kids.").

<sup>20</sup> Arbitron Inc., *supra* note 15, at 71 (among Americans aged 12-34 who downloaded or streamed programming via the [sic] "internet", 28% viewed the programming on their televisions, 30% on their desktops/laptops, 12% on their tablets, and 12% on their cell phones; these figures were higher in all categories than those for the general survey pool).

<sup>21</sup> *Id.* at 12.

<sup>22</sup> *Id.* at 33.

<sup>23</sup> *Id.* at 34.

<sup>24</sup> *Id.* at 32. The survey also showed that Americans aged 12-17 are more likely to own smartphones than Americans in several other adult age groups (i.e, only 51% of 45-54 year olds, 34% of 55-64 year olds, and 17% of those 65 and older own smartphones). *Id.*

<sup>25</sup> Mary Madden et al., Pew Research Center, Pew Research Center's [sic] "internet" & American Life Project and The Berkman Center for [sic] "internet" and Society at Harvard University, *Teens and Technology 2013*, at 4-5 (Mar. 13, 2012), available at [http://www.pew\[sic\].org/~media/Files/Reports/2013/PIP\\_TeensandTechnology2013.pdf](http://www.pew[sic].org/~media/Files/Reports/2013/PIP_TeensandTechnology2013.pdf).

<sup>26</sup> See *American Households See Tablet as Playmate, Teacher and Babysitter*, NIELSEN (Feb. 16, 2012) <http://www.nielsen.com/us/en/newswire/2012/american-families-see-tablets-as-playmate-teacher-and-babysitter.html> (Nielsen survey of adults with children under 12 in tablet-owning households in Q4 2011 shows that seven out of every 10 children in tablet-owning households used a tablet computer - a nine percent increase from previous quarter).

<sup>27</sup> See, e.g., KJ Dell'Antonia, *Parents of the 'Touch-Screen Generation,' Don't Free Your iPad Yet*, NEW YORK TIMES MOTHERLODE BLOG (Mar. 31, 2013, 9:57 AM), <http://parenting.blogs.nytimes.com/2013/03/21/parents-of-the-touch-screen-generation-dont-free-your-ipad-yet/>; Nick Bilton, *The Child, the Tablet and the Developing Mind*, NEW YORK TIMES BITS BLOG (Mar. 31, 2013, 11:11 AM), <http://bits.blogs.nytimes.com/2013/03/31/disruptions-what-does-a-tablet-do-to-the-childs-mind>; Hanna Rosin, *The Touch-Screen Generation*, THE ATLANTIC, Apr. 2013, available at <http://www.theatlantic.com/magazine/archive/2013/04/the-touch-screen-generation/309250/>.

<sup>28</sup> Pew Research Center, Pew Research Center's [sic] "internet" & American Life Project, *Teen [sic] "internet" Access Demographics*, [http://www.pew\[sic\].org/Trend-Data-\(Teens\)/Whos-Online.aspx](http://www.pew[sic].org/Trend-Data-(Teens)/Whos-Online.aspx) (visited June 17, 2013).

<sup>29</sup> Arbitron, Inc., *supra* note 15, at 37 (52 percent of mobile phone owners report that their phones are "always" within arm's length and 30 percent report that their phones are within arm's length "most of the time").

<sup>30</sup> See Amanda Lenhart et al., Pew Research Center, Pew Research Center's [sic] "internet" & American Life Project, *Teens, Kindness and Cruelty on Social Network Sites*, at 76 (Nov. 9, 2011), available at [http://www.pew\[sic\].org/~media/Files/Reports/2011/PIP\\_Teens-Kindness\\_Cruelty\\_SNS\\_Report\\_Nov\\_2011\\_FINAL\\_110711.pdf](http://www.pew[sic].org/~media/Files/Reports/2011/PIP_Teens-Kindness_Cruelty_SNS_Report_Nov_2011_FINAL_110711.pdf) (81% of parents reported

<sup>31</sup> either being "very" or "somewhat" concerned with their child's exposure to inappropriate content through the use of [sic] "internet" or cell phones).

<sup>32</sup> See Center on Media and Human Development, School of Communication, Northwestern University, *Parenting in the Age of Digital Technology: A National Survey*, at 11 (June 2013), available at [http://web5.soc.northwestern.edu/cmhd/wp-content/uploads/2013/05/Parenting-Report\\_FINAL.pdf](http://web5.soc.northwestern.edu/cmhd/wp-content/uploads/2013/05/Parenting-Report_FINAL.pdf) (survey shows that 38 percent of parents with children under age eight are concerned that their children will become "addicted" to mobile devices).

<sup>33</sup> *Pacifica*, 438 U.S. at 750.

<sup>34</sup> See, e.g., *Second Circuit Fox II*, 613 F.3d at 334-35 (FCC indecency policy forces broadcasters to "choose between not airing or censoring controversial programs and risking massive fines or possibly even loss of their licenses, and it is not surprising which option they choose;" application of policy to live broadcasts "creates an even more profound chilling effect;" effect "extends to news and public affairs programming as well."); *Second Circuit Fox I*, 489 F.3d at 463 ("We can understand why the Networks argue that the FCC's [indecency test] ... fails to provide the clarity required by the Constitution, creates an undue chilling effect on free speech, and requires broadcasters to 'steer far wider of the unlawful zone.'"); see also discussion at *infra* Section II.C.

<sup>35</sup> *Second Circuit Fox II*, 613 F.3d at 326.

<sup>36</sup> *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727, 744-45 (1996) (quoting *Pacifica*, 438 U.S. At 748).

<sup>37</sup> 71 Multichannel video programming distributors (MVPDs) deliver hundreds of channels to their subscribers, including many with adult-oriented or other programming inappropriate for children. (Verizon's FiOS TV offers 530 all-digital video channels and 130 high definition ("HD") channels; AT&T's U-Verse TV offers anywhere from 130 to 470 video channels, and 170 HD channels); (Comcast video services range that may include over 300 linear channels and more than 100 HD channels; Time Warner Cable similarly offers hundreds of video channels and HD channels). The average basic cable package contains 49 channels of programming. Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Report on Cable Industry Prices, DA 13-1319, ¶ 18 (rel. Jun. 7, 2013). An estimated 82.2 percent of U.S. television households subscribe to MVPD service. See GfK-Knowledge Networks, Home Technology Monitor 2012 Ownership Survey and Trend Report (Spring 2012-March 2012).

<sup>38</sup> See, e.g., *Second Circuit Fox II*, 613 F.3d at 326 (the V-chip has "given parents the ability to decide which programs they will permit their children to watch," and there thus "now exists a way to block programs that contain indecent speech in a way that was not possible" at the time of *Pacifica*.); *Supreme Court Fox I*, 556 U.S. at 534 & n.\* (Thomas, J., concurring) ("technology has provided innovative solutions to assist adults in screening their children from unsuitable programming – even when that programming appears on broadcast channels"). In addition to the V-chip, parental controls provided through cable and satellite providers are available and frequently used by parents.

<sup>39</sup> *Supreme Court Fox I*, 556 U.S. at 533, 535 (Thomas, J., concurring).

<sup>40</sup> *Supreme Court Fox II*, 132 S. Ct. at 2321 (Ginsburg, J., concurring).

<sup>41</sup> *FCC v. CBS Corp.*, 132 S. Ct. 2677 (2012) (Ginsburg, J. concurring in denial of petition for writ of certiorari). Judge Edwards of the D.C. Circuit has also indicated that "[w]hatever the merits of *Pacifica* when it was issued ..., it makes no sense now." *Action for Children's Television v. FCC*, 58 F.3d 654, 673 (D.C. Cir. 1995) ("*ACT III*") (Edwards, J., dissenting). And FCC Commissioner Furchtgott-Roth similarly opined that the "continuing validity" of *Pacifica* "is highly doubtful from both an empirical and jurisprudential point of view." *Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8020 (2001) (Separate Statement of Commissioner Furchtgott-Roth) ("*2001 Policy Statement*").

<sup>42</sup> *Supreme Court Fox I*, 556 U.S. at 544 n.5 (Stevens, J., dissenting).

<sup>43</sup> *Pacifica*, 438 U.S. at 750 (*emphasis added*).

<sup>44</sup> *Id.* at 761 n.4 (Powell, J., concurring; Blackmun, J., joining concurrence) (*emphasis added*).

<sup>45</sup> *Id.* at 760-61.

<sup>46</sup> *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (quoting *Sable Communications of Cal., Inc. v.*

<sup>47</sup> *FCC*, 492 U.S. 115, 127 (1989)).

<sup>48</sup> *Supreme Court Fox I*, 556 U.S. at 542 (Stevens, J., dissenting).

<sup>49</sup> 51 *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 n.14 (D.C. Cir. 1988) (*emphasis added*).

<sup>50</sup> “*Petition for Clarification of Reconsideration*” of a Citizen’s Complaint Against *Pacifica Foundation*, Memorandum Opinion and Order, 59 F.C.C. 2d 892, 893 n.1 (1976).

<sup>52</sup> *Application of WGBH Educational Foundation for Renewal of License of Noncommercial Educational Station WGBH-TV, Boston, Massachusetts*, Memorandum Opinion and Order, 69 F.C.C. 2d 1250, 1254 (1978) (“WGBH”) (brackets in FCC decision).

<sup>54</sup> *Id.* at 1254 n.6. See also *Application of Pacifica Foundation*, Memorandum Opinion and Order, 95 F.C.C.2d 750, 760 (1983) (broadcasts of “motherfucker,” “fuck,” and “shit” not actionably indecent).

<sup>55</sup> *New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees*, Public Notice, 2 FCC Rcd 2726, 2726 (1987).

<sup>56</sup> *Pacifica MO&O*, 2 FCC at 2699 ¶ 13. Accord, *The Regents of the University of California*, Memorandum Opinion and Order, 2 FCC Rcd 2703, 2703 ¶ 3 (1987) (“Speech that is indecent must involve more than an isolated use of an offensive word.”).

<sup>57</sup> *WPBN/WTOM License Subsidiary, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 1838, 1841-42 ¶¶ 11-12 (2000) (nudity in “Schindler’s List” not indecent).

<sup>58</sup> See, e.g., *Lincoln Dellar, For Renewal of License of Stations KPRL(AM) and KDDB(FM)*, Memorandum Opinion and Order, 8 FCC Rcd 2582, 2585 ¶ 3 (MMB 1993); *L.M. Communications of South Carolina, Inc.*, Letter, 7 FCC Rcd 1595 (MMB 1992). These decisions were cited in the 2001 Policy Statement as “cases where material was found not indecent because it was fleeting and isolated.” 2001 Policy Statement, 16 FCC Rcd at 8008 ¶18.

<sup>59</sup> See also *Golden Globe*, 19 FCC Rcd at 4980 n.32 (citing similar unpublished staff decisions from 2001 and 2002).

<sup>60</sup> *Supreme Court Fox II*, 132 S. Ct. at 2318.

<sup>61</sup> *Supreme Court Fox I*, 556 U.S. at 544 n.5 (Stevens, J., dissenting).

<sup>62</sup> *Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664 (2006) (“*Omnibus Order*”), vacated in part on other grounds, Order, 21 FCC Rcd 13299 (2006) (“*Remand Order*”); *Golden Globe*, 19 FCC Rcd at 4982 ¶ 16.

<sup>63</sup> See *Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broadcast of the Program “NYPD Blue”*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 1596 (2008) (broadcast of a woman’s buttocks for seven seconds and the side of her breast for a moment in an episode of NYPD Blue found to be actionably indecent); *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Forfeiture Order, 21 FCC Rcd 2760 (2006) (following Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 19230, 19235 ¶ 13 (2004)) (finding broadcast of a woman’s breast during live performance for nine-sixteenths of a second to be actionably indecent); *Young Broadcasting of San Francisco, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1751 (2004) (finding broadcast of a penis during a news show segment for less than one second to be actionably indecent).

<sup>64</sup> *Omnibus Order*, 21 FCC Rcd at 2699 ¶ 141.

<sup>65</sup> *See Remand Order*, 21 FCC Rcd at 13326-28 ¶¶ 67-73. This decision also reversed a previous finding that the use of the word “shit” in an episode of “NYPD Blue” was actionably indecent, but on procedural, rather than substantive grounds. *Id.* at 13328-29, ¶¶ 74-77.

<sup>66</sup> *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network’s Presentation of the Film “Saving Private Ryan”*, Memorandum Opinion and Order, 20 FCC Rcd 4507 (2005) (“*Saving Private Ryan Order*”).

<sup>67</sup> *Id.* at 4512-13 ¶ 14.

<sup>68</sup> *Id.* at 4513 ¶ 14.

<sup>69</sup> *See id.* at 4513-14 ¶ 18.

<sup>70</sup> *Omnibus Order*, 21 FCC Rcd at 2664 ¶ 2.

<sup>71</sup> The documentary contains interviews of blues performers, a record producer, and other individuals in which the interviewees use “the ‘F-Word,’ the ‘S-Word,’ and various derivatives of those words.” *Id.* at 2683 ¶ 72.

<sup>72</sup> *Id.* at 2686 ¶ 82.

<sup>73</sup> *Id.*

<sup>74</sup> *See, e.g., Complaints Against Various Television Licensees Concerning Their Dec. 31, 2004 Broadcast of the Program “Without a Trace,” Notice of Apparent Liability of Forfeiture*, 21 FCC Rcd 2732 (2006), cancelled in part, *Order*, 21 FCC Rcd 3110 (2006) (“*Without a Trace*”). An episode of “Without a Trace” found to be indecent included teenage sexual conduct, but no nudity. Despite the lack of actual nudity, the FCC concluded that the program “[went] well beyond what the story line could reasonably be said to require.” *Id.* at 2736 ¶ 15.

<sup>75</sup> “[E]sthetic and moral judgments about art and literature ... are for the individual to make, not for the Government to decree.” *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 818 (2000). Such content-based determinations of whether speech is acceptable should be presumptively unreasonable, for “[i]t is rare that a regulation restricting speech because of its content will ever be permissible.” *Id.*

<sup>76</sup> *Omnibus Order*, 21 FCC Rcd at 2685 ¶ 77.

<sup>77</sup> *Playboy*, 529 U.S. at 818. *See also Cohen v. California*, 403 U.S. 15, 25 (1971)(discussing “matters of taste and style” where “governmental officials cannot make principled distinctions”); *Brown v. Entm’t Merchants Ass’n*, 131 S.Ct. 2729, 2733 (2011).

<sup>78</sup> *See, e.g., Amicus Br. for the National Association of Broadcasters and Radio-Television Digital News Association in Support of Respondents at 20-28, Supreme Court Fox II* (Nov. 10, 2011); *Amicus Br. for the National Association of Broadcasters and Radio Television News Directors Association in Support of Respondents at 20-29, Supreme Court Fox I* (Aug. 8, 2008) (“*Supreme Court Fox I NAB Amicus Br.*”).



<sup>79</sup> *Second Circuit Fox II*, 613 F.3d at 334-35.

<sup>80</sup> See Edward Wyatt, *PBS Warns Stations of Risks from Profanity in War Film*, NEW YORK TIMES, Feb. 18, 2005, at C2.

<sup>81</sup> See Frank Mungeam, *Video: KGW Crew Harassed at Occupy Portland*, KGW.com (Nov. 8, 2011, 5:19 PM), <http://www.kgw.com/news/local/Videoshows-KGW-crew-harassed-at-OccupyPortland-133496118.html>.

<sup>82</sup> See Burton Crane, *It's Time to End Censorship on the Public Airwaves*, Philly.com (Jan. 18, 2012), [http://articles.philly.com/2012-01-18/news/30639524\\_1\\_censorship-first-amendment-npr](http://articles.philly.com/2012-01-18/news/30639524_1_censorship-first-amendment-npr).

<sup>83</sup> See Lisa de Moraes, *Some Local Stations Cautious in Gauguin Painting Coverage*, WASH. POST, Apr. 6, 2011, at C01.

<sup>84</sup> See *Second Circuit Fox II*, 613 F.3d at 335 (observing as examples of chilled speech that Fox decided not to air an episode of “That 70s Show” which later “won an award from the Kaiser Family Foundation for its honest and accurate depiction of a sexual health issue;” “an episode of ‘House’ was re-written after concerns that one of the character’s struggles with psychiatric issues related to his sexuality would be considered indecent”).

<sup>85</sup> See, e.g., *Second Circuit Fox I*; *Second Circuit Fox II*; *Supreme Court Fox II*; *CBS Corp. v. FCC*, 663 F.3d 122 (3d Cir. 2011) (holding that the FCC’s sanction of fleeting indecent nudity during a live broadcast was arbitrary and capricious due to the FCC’s failure to give notice or justify its departure from prior indecency policy); see also John Eggerton, *DOJ, FCC Drop Pursuit of Fox ‘Married by America’ Indecency Fine*, BROADCASTING & CABLE (Sept. 21, 2012, 5:09 PM), [http://www.broadcastingcable.com/article/489505-DOJ\\_FCC\\_Drop\\_Pursuit\\_of\\_Fox\\_Married\\_by\\_America\\_Indecency\\_Fine.php](http://www.broadcastingcable.com/article/489505-DOJ_FCC_Drop_Pursuit_of_Fox_Married_by_America_Indecency_Fine.php).

<sup>86</sup> See, e.g., *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4348 ¶ 271 (2011) (noting that Commission action on 11 NBCU television station license renewal applications “has been stayed in part due to pending indecency complaints filed against the stations”) (citation omitted).

<sup>87</sup> See *Public Notice*, 28 FCC Rcd at 4082 (describing reduction in backlog by closing complaints that were, among other things, “outside FCC jurisdiction, that contained insufficient information, or that were foreclosed by settled precedent.”). Even these clearly non-meritorious cases can be the cause of delayed action on license renewal applications.

<sup>89</sup> 47 U.S.C. § 504(c).

<sup>88</sup> NAB has discussed these issues in detail in court filings. See *Supreme Court Fox I* NAB Amicus Br. at 30-33.

<sup>89</sup> The *Golden Globe* decision left open numerous questions for broadcasters seeking to comply with the revised indecency policy, such as which of the “specific facts” the Commission relied upon would make a difference in their cases (e.g., was it the use of the word “fucking” itself that dictated the indecency ruling?; the use of this expletive “on a nationally telecast awards ceremony”?; that the network “could have” but did not “delay[] the broadcast for a period of time sufficient ... to effectively bleep the offending word”? See *Golden Globe*, 19 FCC Rcd at 4979 ¶ 9, 4980 ¶ 11). Such questions prompted broadcasters to seek reconsideration of the *Golden Globe* decision. Unfortunately, further clarification from the Commission was not forthcoming. The Commission never acted on the petitions and thus never finalized the order for judicial review. Similarly, the 2006 decision condemning “The Blues” as indecent is still not final (and thus not ripe for judicial consideration) because the Commission still has not acted upon the broadcasters’ oppositions to its notice of apparent liability. See *Remand Order*, 21 FCC Rcd at 13311 n.86 (declining to address broadcasters’ arguments and stating that it would “address such issues in further proceedings in that case”).

<sup>90</sup> See *City of Littleton v. Z.J. Gifts D-4*, 541 U.S. 774 (2004). See also *Freedman v. Maryland*, 380 U.S. 51, 58 (1964) (an administrative licensing process that regulates speech can overcome the presumption of unconstitutionality only if it contains “procedural safeguards designed to obviate the dangers of a censorship system”); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133-34 (1992) (overturning county ordinance because it lacked procedural safeguards to prevent viewpoint discrimination: the ordinance did not require officials to explain their decisions or to render a decision in any particular timeframe; provided no process for appealing an adverse decision; and lacked criteria to guide official discretion and prevent arbitrary decision making).

<sup>91</sup> *Supreme Court Fox II*, 132 S.Ct. At 2320.

<sup>92</sup> *2001 Policy Statement*, 16 FCC Rcd at 8002 ¶ 7.

<sup>93</sup> See, e.g., *Omnibus Order*, 21 FCC Rcd at 2684 ¶ 74 (“In light of the core meanings of the ‘F-Word’ and ‘S-Word,’ any use of those terms inherently has sexual or excretory connotations and falls within the first prong of our indecency definition.”).

<sup>94</sup> *Supreme Court Fox I*, 556 U.S. at 543-44 (Stevens, J., dissenting). See also *Second Circuit Fox I*, 489 F.3d at 459 (in response to the FCC’s claim that “even non-literal uses of expletives must fall within its indecency definition because it is ‘difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions,’” quoting *Remand Order*, 21 FCC Rcd at 13308 ¶ 23, the court stated that “[t]his defies any commonsense understanding of these words, which, as the general public well knows, are often used in everyday conversation without any ‘sexual or excretory’ meaning. Bono’s exclamation that his victory at the Golden Globe Awards was ‘really, really fucking brilliant’ is a prime example of a non-literal use of the ‘F-Word’ that has no sexual connotation.”).

<sup>95</sup> See, e.g., *Without a Trace*, 21 FCC Rcd at 2732; *Complaints Against Various Licensees Regarding Their Broadcast Of The FOX Television Network Program “Married By America” On April 7, 2003*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 20191 (2004).

<sup>96</sup> *Cohen v. California*, 403 U.S. 15, 20 (1971).

<sup>97</sup> See *Cohen v. California*, 403 U.S. at 25-26 (“it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force.”).

<sup>98</sup> See Federal Communications Commission Twitter, (Apr. 20, 2013, 3:55 PM), [https://twitter-](https://twitter-com/FCC/status/325714412143013888)

<sup>99</sup> [om/FCC/status/325714412143013888](https://twitter-com/FCC/status/325714412143013888). (“David Ortiz *spoke from the heart* at today’s Red Sox game. I stand with Big Papi and the people of Boston. – Julius”) (emphasis added); see also Elizabeth Titus, *FCC Chairman Genachowski Tweets on Ortiz F-Bomb*, POLITICO (Apr. 20, 2013, 8:46 PM), <http://www.politico.com/story/2013/04/fcc-julius-genachowski-david-ortiz-twitter-90376.html>.

<sup>100</sup> See, e.g., *Cohen v. California*, 403 U.S. at 26 (government cannot “forbid particular words without also running a substantial risk of suppressing ideas in the process”).

<sup>101</sup> <sup>103</sup> *2001 Policy Statement*, 16 FCC Rcd at 8003 ¶ 10, 8008-10 ¶¶ 17-18.



<sup>102</sup> See *Supreme Court Fox II*, 132 S. Ct. 2307, 2318 (2012) (“The Commission’s lack of notice to Fox and ABC ... ‘fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.’ This would be true with respect to a regulatory change this abrupt on any subject, but it is surely the case when applied to the regulations in question, regulations that touch upon ‘sensitive areas of basic First Amendment freedoms.’”) (citations omitted); *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

<sup>103</sup> See, e.g., *Supreme Court Fox II*, 132 S. Ct. at 2318 (“The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect.”) (quoting *Reno v. ACLU*, 521 U.S. at 870-71); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (if “law interferes with the right of free speech or of association, a more stringent vagueness test should apply”); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 683-84 (1968) (Court recognized that “vice of vagueness” produces chilling effect on creators and distributors of media products).

<sup>104</sup> *Trinity Broadcasting v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000).

<sup>105</sup> See *Second Circuit Fox II*, 613 F.3d at 332 (the standard is one “that even the FCC cannot articulate or apply consistently.”).

<sup>106</sup> Compare *Citadel Broadcasting Co.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 11839, 11840 ¶ 6 (EB 2001) (song indecent because it “contains unmistakable offensive sexual references. In this regard, portions of the lyrics contain sexual references in conjunction with sexual expletives that appear intended to pander and shock”) with *Citadel Broadcasting Co.*, Memorandum Opinion and Order, 17 FCC Rcd 483, 486 ¶ 10 (EB 2002) (same song not indecent because the sexual references “are not expressed in terms sufficiently explicit or graphic enough to be found patently offensive,” and “do not appear to pander to, or to be used to titillate or shock its audience”). Compare *The KBOO Foundation*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 10731, 10733 ¶ 8 (EB 2001) (song indecent because, notwithstanding its “contemporary social commentary,” its “sexual references appear to be designed to pander and shock and are patently offensive.”) with *The KBOO Foundation*, Memorandum Opinion and Order, 18 FCC Rcd 2472, 2474 ¶ 9 (EB 2003) (same song not indecent because, “[w]hile this is a very close case, we now conclude that the broadcast was not indecent because, on balance and in context, the sexual descriptions in the song are not sufficiently graphic to warrant sanction. For example, the most graphic phrase (‘six foot blow job machine’) was not repeated. Moreover, we take cognizance of the fact presented in this record that Ms. Jones has been asked to perform this song at high school assemblies.”).

<sup>107</sup> See *supra* Section II.B, discussing “The Early Show.”

<sup>108</sup> *Second Circuit Fox II*, 613 F.3d at 330 (FCC concluded that “bullshit” in an episode of “NYPD Blue” was patently offensive while “dick” and “dickhead” were not, essentially because “bullshit” is “vulgar, graphic and explicit” while “dick” and “dickhead” were not sufficiently vulgar, graphic or explicit).

<sup>109</sup> See *supra* Section II.B.

<sup>110</sup> The Second Circuit found this “disparate treatment” inexplicable:

<sup>112</sup> We query how fleeting expletives could be more essential to the ‘realism’ of a fictional movie than to the “realism” of interviews with real people about real life events, and it is hard not to speculate that the FCC was simply more comfortable with the themes in “Saving Private Ryan,” a mainstream movie with a familiar cultural milieu, than it was with “The Blues,” which largely profiled an outsider genre of musical experience.

<sup>114</sup> *Second Circuit Fox II*, 613 F.3d at 333.

<sup>115</sup> *Id.* at 332. See *id.* (referring to the Commission's "indiscernible" standard).

<sup>116</sup> *CBS v. Democratic National Committee*, 412 U.S. 94, 124 (1973). See also *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) ("the Commission has chosen to value most highly the goal of preserving licensee discretion and flexibility in selecting the types of programming which are responsive to community issues. Seeking to maximize the journalistic discretion of licensees, especially in the constitutionally sensitive area of informational programming, is clearly consistent with the Commission's statutory duty to chart a workable middle course in its quest to preserve a balance between the essential public accountability and the desired private control of the media.") (internal quotation marks omitted).

<sup>117</sup> *I. Turner Broadcasting System v. FCC*, 512 U.S. 622, 650-51 (1994) (quoting Hubbard Broadcasting, Inc., Memorandum Opinion and Order, 48 F.C.C.2d 517, 520 (1974)). We recognize that the Supreme Court has held that section 326 "does not limit the Commission's authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting." *Pacifica*, 438 U.S. at 738. But the Commission still must develop an indecency policy that is as consistent as possible with the policies of governmental restraint underlying section 326. See *WGBH*, 69 F.C.C.2d at 1254 ("With regard to 'indecent' or 'profane' utterances, the First Amendment and the 'no censorship' provision of Section 326 of the Communications Act severely limit any role by the Commission and the courts in enforcing the proscription contained in Section 1464").

<sup>118</sup> *WGBH*, 69 F.C.C. 2d at 1254-55; see also *id.* at 1255 ("We wish to stress again that it is first and foremost the individual licensee's responsibility to decide what programming is appropriate or suitable for airing to their audiences, and when. Moreover, because of the broad importance of avoiding any intrusive role for government, we believe that the independence of the broadcast medium and the free exchange of ideas over the airwaves depends significantly on the mutual exercise of judgment by broadcasters and viewers alike.").

<sup>119</sup> *Peter Branton*, Letter, 6 FCC Rcd 610, 610 (1991) (citation omitted).

<sup>120</sup> *Omnibus Order*, 21 FCC Rcd at 2668 ¶ 15. The FCC consistently defers to the judgment of broadcasters in program selection generally, and rejects challenges to license renewals based on programming-related complaints. See, e.g., *Application of WGBH Educational Foundation*, 69 FCC 2d 1250, 1251 (1978) (in determining whether a licensee has served the public interest, "consideration of a licensee's programming is and must be limited to determining whether the licensee's overall programming has served its service area, and not whether any particular program is 'appropriate'" (emphasis in original); *Certain Broadcast Stations Serving Communities in the State of Louisiana*, Memorandum Opinion and Order and Notice of Apparent Liability, 7 FCC Rcd 1503, 1507 ¶ 30(1992) (in determining during license renewal process whether a licensee served the public interest, the FCC "focuses on whether the licensee has made a reasonable effort in its overall programming"); *Commission En Banc Programming Inquiry*, Public Notice, 44 F.C.C. 2303, 2307-08 (1960) (FCC must "determine whether the total program service of broadcasters is reasonably responsive to the interests and needs of the public they serve," and cannot base licensing decisions "upon its own subjective determination of what is or is not a good program.").

<sup>121</sup> *2001 Policy Statement*, 16 FCC Rcd at 8000 ¶ 3. *Accord*, *ACT III*, 58 F.3d at 660 ("strict scrutiny" applies to broadcast indecency regulation but in a way that "take[s] into account the unique context of the broadcast medium."); *id.* at 660-69 (applying "compelling interest" and "least restrictive means" criteria).

<sup>122</sup> See *Public Notice*, 28 FCC Rcd at 4082 ("indecency policies and enforcement" both must be "consistent with vital First Amendment principles").